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Cross-border temporary agency work

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Cross-border temporary agency work Presentation Prague

Slide 1

Thank you professor Ecklund for the comprehensive introduction to the theme and of course many thanks to the organizing committee for hosting such an inspiring event. I have been deputized by Mijke to talk to you about her Research and I will try to do so to the best of my abilities I'm a colleague of Mijke at Tilburg University.

I will talk about Temporary Agency Work in the context of cross-border movement & service provision within the EU.

Our starting point is the Temporary Agency Work Directive. Almost 5 years ago (Dec 2012), not long after the implementation period of the Temporary Agency Work Directive had ended, the European sectoral social partners emphasized the positive role of Temporary Agency Work in increasing the chances of agency workers for long-term employment in the labour market and the possibility of vocational training provided by Temporary Employment Agencies.

In this respect, they referred to the preamble of the EU Directive on Temporary Agency Work, where it is stated that this form of employment "[...] meets not only undertakings' needs for flexibility but also the need of employees to reconcile their working and private lives. So, Temporary Agency Work therefore contributes to job creation and to participation and integration in the labour market (recital 10 Dir 2008/104)

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One of the legal tools to achieve this is The Temporary Agency Work Directive. The directive necessarily has – although it lacks a clear provision concerning its territorial scope - a national scope of application

But The question we will address today is whether *cross-border* temporary agency workers can equally profit from the perceived advantages of TAW for local workers, as expressed in the TAW-Directive? So, is cross-border TAW equally beneficial from a workers perspective as agency work within national borders?

According to World Employment Confederation (position paper 21 st Sept 2016): the posting of (agency) workers offers opportunities for companies to meet economic needs and for workers to explore new professional opportunities

The idea that cross border mobility is driven by these needs is certainly respectable but is different from what is usually mentioned on the national level to promote the Temporary work agencies as 'normal employers'. Does cross-border Temporary agency work - apart from employer needs - also serve the social advancement of workers (not only high skilled workers)? Is it a stepping stone for (decent standard) jobs? Is vocational training facilitated? Does it help employees in their need to reconcile their working and private lives?

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Why are these cross border issues important? Why do they matter? Well, because transnational labour mobility, including the posting and placement of agency workers is rapidly increasing. It is up from 1,60 % to 2,4% to 3,3% of the total population of EU nationals in 2014. And the estimates are that this trend will continue. In fact, cross-border labour mobility is actively promoted, since it is seen as a key pillar of European integration and the EU internal market. And Labour market intermediaries play an important role in this development.

But how beneficial is this trend for workers from a (long term) social perspective? From the perspective of a social market economy (see art 2/3 TFEU), from a social sustainability perspective, if you like?

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Research shows that there was a rapid increase in the number of labour market intermediaries towards the end of the twentieth century after many EU countries lifted restrictions on temporary agency work. In some sectors and geographical areas, intermediaries have become strongly associated with migration and cost-reduction as well as flexibility. While the majority of labour market intermediaries are formally registered enterprises, some of them operate informally without being registered.

This role of employment and recruitment agencies in a cross-border context remains a matter of concern. It has consistently been highlighted that agency workers are exposed to a heightened risk of exploitative working conditions.

Sometimes, intermediaries in other Member States are used with the sole purpose of turning (temporary or seasonal) migration into posting. When, for example, a TWA recruits Polish workers for jobs in Sweden, the factual circumstances don't change whether the temporary work agency is Polish or Swedish, but the legal situation does.

Therefore, blurring regulatory concepts and criteria also generates opportunities for non-compliance, which may result in violations of labour law and other (fundamental) rights of workers. That's what we mean with the phrase 'regulatory arbitrage' in the title of this presentation. Regulatory arbitrage is used as a term for 'A practice whereby firms capitalize on loopholes in *regulatory* systems in order to circumvent unfavorable regulation.'

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So, these exploitative conditions of work are confirmed in other recent studies as well, for example a study from the EU Fundamental Rights Agency (Summer 2015)

Another relevant report is from SOMO (which is the Dutch centre for research on multinational corporations) on working conditions of Polish migrant workers in the Netherlands and the role of recruitment agencies. In all examples mentioned the following features are present:

- Excessive working days or hours,
- Bad living conditions

- Hazardous work (occupational health and safety standards are ignored)

What's the role of these loopholes in the regulatory framework of cross-border TAW in these disturbing findings? We will first turn to the relevant rules and then turn to their (non-) application (circumvention/creative interpretation) and (non-)enforcement

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So legally, We can distinguish two types of cross border temporary agency workers. The recruited temp agency worker is recruited (for instance by an employment placement agency established) in a 'sending' MS but placed in a user company by a Temporary Work Agency established in the country of destination.

From a EU Law perspective this means the worker is covered by the free movement of workers, enshrined in Art 45 TFEU, and therefore covered by the labour, social security and tax law in the country of destination, including this country's implementation of the TAW-Directive.

Posted agency workers on the other hand are sent to a user firm in the country of destination by a TWA established in a 'sending country'. So here it is the (formal) employer in his role as temp cross-border service provider who uses the freedom to provide services (Art 56 TFEU) .

This legal difference between posted and recruited cross-border temp agency workers is accompanied/reinforced by different 'narratives':

So, the narrative of free movement of workers is based on full equal treatment of local and cross border workers but in contrast, the *posting* of workers falls under the heading of EU free movement of services, and essentially regards workers as 'commodities' or 'tools' with which the service provider may provide his services in another Member State.

The posting mechanism involves workers being temporarily employed in other Member States than that of the sending MS while being taxed in and contributing to the social security system of the sending Member State. This places the focus on the needs of both the employer and the sending Member State, and this way the posting mechanism can serve as a useful tool to increase the total labour, tax and social security revenues.

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So for posted workers, at this moment the application of the posting directive takes precedence over the temporary agency work directive. But the current commission proposal revises the posting directive in such a way that the terms and conditions under Article 5 of Temporary Agency Work Directive will become mandatory for posted workers. So it applies the principle of equal treatment between temporary agency workers and comparable workers of the user undertakings.

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If this proposal would be adopted, would this mean that there are no more differences between the two and would this benefit posted temporary agency workers? For example in

terms of being informed of vacant posts, equal access to collective facilities, measures related to access to training?

Well, No (!), since these rights are not included in Art 5 TAWD but in Art 6 and further provisions of the directive.

Furthermore, considering the distinction between workers movement under Art 45 TFEU and the provision of services under Art 56 TFEU - '*recruited*' cross-border agency workers gain full access to all social and fiscal advantages in the host MS, whereas *posted* agency workers stay insured for social security in the sending state.

So being a *recruited* cross border agency worker is still much more attractive than being a posted one.

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Well, in practice, social dumping has become a critical issue. This quote by Violeta Bulc - the Commissioner for transport - is very instructive in this respect :

She says: » too often, workers like Radu, 30, from Bucarest, are hired through a very complex mix of companies, subsidiaries , agencies based in different eu member states, some of which have no real existence. As a result, they are hired at the lowest possible cost and they are not protected whenever problems arise. "

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And research shows that in practice, *both* recruited and posted cross-border temp agency workers experience that rights which cannot be enforced are pretty much worthless.

Despite the more favourable position of '*recruited*' transnational temp agency workers on paper, in practice the gap isn't so large: In both situations there are large problems related to non or semi compliance with the applicable rules.

Furthermore, the monitoring of recruitment and temporary work agencies in a cross-border context involves several huge challenges. Complex and non-transparent labour relationships involving a chain of actors operating in several countries make monitoring extremely difficult.

In addition to this, labour inspectorates have limited mandates – especially when it comes to cross border issues - which hinders effective monitoring.

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One of the main problems behind the scenes is linked to corporate law; it is simply far too easy to register companies in most MS. This is an incentive to create so-called letterbox companies (and to close or dissolve them again whenever Inspectorates come too close).

So these Letterbox companies are legal entities established on paper in any EU jurisdiction without many or any economic material activities carried out in that jurisdiction. This enables cutting costs via tax avoidance, lower labour standards and social security fraud.

So... - Should Employment Placement Agencies and Temporary Work Agencies be able to register anywhere?

- From a 'letterbox perspective' the answer is obviously no...

However, it's up to national jurisdictions to determine the legal existence and capacity of a company which happens either by the place of its incorporation (incorporation theory) or by the location of its actual administrative office (real seat theory).

(european social partners advocate a european based real seat norm)

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A major difficulty in combating such exploitative bogus arrangements is that EU law in principle does not prohibit these companies and the Court of Justice has facilitated the establishment of letterbox companies, empty shelf firms, by its case law in a number of cases. (centros, inspire art, ueberseering etc)

This is a nice example of a Belgian website advertising Bulgaria as the place to create your letterbox firm. It advocates Bulgaria as "outsourcing star of Europe" "Tax paradise" "Lowest social costs". We think it is a very striking example.

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So, if we were to mention some preliminary conclusions, we could say that

- The regulatory framework for TAW in cross-border context inhibits application, monitoring and enforcement: it is simply far too complicated. We should ask ourselves –What are the bona-fide advantages of facilitating Labour Market Intermediaries have to post agency workers across borders instead of placing them?
- A possible way forward could be to abolish the possibility for establishing letterbox-companies and posting of agency workers (at least in certain risk sectors, such as agriculture, construction, road transport) and put all efforts on creating more effective monitoring and enforcement mechanisms for cross-border recruited agency workers instead.
- With respect to fundamental rights, especially the right to family life. We should promote a better reconciliation of work and private life: Where ever possible we should bring the work to the people instead of the people to the work.

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And as a closing remark, such a better balance between economic and social interests in cross-border temp agency work, would also be very much in line with the Commission Juncker outline for a European Pillar of Social Rights which focuses on equal treatment and the prevention of abuse of precarious forms of labour. Maybe this could serve as a catalyst to correct these unfair imbalance in the EU transnational labour market.

Slide 15 Thank you very much for your attention and I'd be happy to refer any questions that I cannot answer to Mijke.